(2) (2)

Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-1393, 84-1430.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit.

JAMES S. DITTMAR*,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200
BARBARA R. ARNWINE,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1145
Counsel for Respondents
**Counsel of Record*

Of Counsel:
RICHARD R. LAVIN,
MATTHEW D. BAXTER,
WIDETT, SLATER & GOLDMAN, P.C.,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

21pp

Question Presented.

Should the Court grant certiorari to review a mootness decision which the Court has already considered and committed to the court of appeals, which has no applicability beyond the circumstances of these cases, which is challenged by reliance on matters not in the record and involving undecided issues of state law and which is in any event correct.

Table of Contents.

Opinions Below	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
A. Prior Proceedings	2
B. The Political Resolution	3
C. Disposition by the Court in 1983	4
D. 1983 Proceedings on Remand	4
E. Disposition by the Court in 1984	5
F. The Court of Appeals' 1984 Decision on Remand	5
Reasons for Denying the Writs	7
I. The Court of Appeals' Mootness Decision Does Not Present a Substantial Federal Question	7
II. The Petitions Rely Upon Matters of Fact Not in the Record and Involve Undecided Issues of State Law	8
III. The Court of Appeals Correctly Determined that These Cases are Moot	11
Conclusion	14
Appendix	1a

Table of Authorities Cited.

CASES.

Alejandrino v. Quezon, 271 U.S. 528 (1926)	13
American Book Co. v. Kansas, 193 U.S. 49 (1904)	13
Boston Chapter, NAACP v. Beecher, 716 F.2d 931 (1st Cir. 1983)	4
Boston Chapter, NAACP v. Beecher, 749 F.2d 102 (1st Cir. 1984)	1, 6
Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, Inc., 461 U.S. 477 (1983)	4
Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S.Ct. 2576 (1984)	passim

Maness v. Meyers, 419 U.S. 449 (1975) 10
McPherson, et al. v. City of Boston Fire Department, Appointing Authority, Massachusetts Civil Service Commission, Appeal No. D-1280 (November 28, 1983) 10
Oil Workers Union v. Missouri, 361 U.S. 363 (1960) 13
Powell v. McCormack, 395 U.S. 486 (1969) 13
Town of Stow v. Marinelli, 352 Mass. 738, 227 N.E.2d 708 (1967) 10
United States v. United Mine Workers of America, 330 U.S. 258 (1947) 10
W.R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983) 10

STATUTES.

United States Constitution
Art. III, § 2, cl. 1 2
Massachusetts General Laws
c. 31, § 33 12
c. 31, § 43 2, 9
1982 Massachusetts Acts
c. 190, § 25 2, 3, 12

Nos. 84-1393, 84-1430.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

Respondents agree with the identification of the opinions below stated in the petitions for certiorari, but note that the consolidated opinion on remand of the United States Court of Appeals for the First Circuit has been reported at 749 F.2d 102 (1st Cir. 1984).

Constitutional and Statutory Provisions.

The petitions involve U.S. Const. Art. III, § 2, cl. 1, which is reproduced at 6a of the Appendix to the petition of Boston Firefighters Union, Local 718.

The statutes involved are 1982 Mass. Acts, c. 190, § 25, which is reproduced at page 6a of the Appendix to the petition of Boston Firefighters Union, Local 718, and Mass. G.L. c. 31, § 43, which is reproduced at page 1a of the Appendix to this brief.

Statement of the Case.

These petitions seek to have the Court grant certiorari in order to decide a question of mootness which the Court has already considered and committed to the court of appeals. Further review by the Court is unnecessary.

A. *Prior Proceedings.*

The court of appeals found moot a controversy which arose in the course of ongoing judicial adminstration of relief in consolidated employment discrimination cases relating to Boston's police and fire departments. The cases have lengthy histories, with which the Court is familiar. See Supreme Court Nos. 81-185, 82-246, 82-259. The controversy which the court of appeals found moot, however, was more recent and short-lived.

In July 1981, assertedly in response to a fiscal crisis, the City of Boston instituted a massive reduction in force program in its police and fire departments. The program was to be administered in accordance with the Massachusetts civil service

statute, which requires layoffs in reverse order of seniority. Black and Hispanic police officers and firefighters challenged the layoff program by applying to the district court for modification of prior court orders in order to prevent the City from reducing their proportional representation below the levels obtaining at the time the program commenced.

The minority officers' requests for modification were opposed by the state civil service officials and intervening unions. They were not opposed by the City or its police and fire commissioners.

The district court held that the layoff program, if administered in accordance with the Massachusetts seniority statute, would interfere with the court's ongoing remedial process. By orders dated August 7, 1981, the court enjoined the police and fire commissioners from reducing the percentage of minority officers obtaining at the commencement of the layoff program.

The court of appeals affirmed.

B. *The Political Resolution.*

In June 1982, Massachusetts enacted legislation resolving the City's asserted fiscal crisis and rescinding the reduction in force program. 1982 Mass. Acts c. 190. The statute, locally known as the Tregor Act, provided the City with new funds and required the reinstatement of all police officers and firefighters who had been laid off as a result of the reduction in force program. *Id.* § 25. The Tregor Act also provided that the City shall not terminate or otherwise separate any reinstated personnel from active service "in the future for lack of funds." *Id.* Finally, the Act required the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983. *Id.* As a result of the Tregor Act, the imminent threat of layoffs was removed and the police and fire departments reinstated with restored seniority all personnel who had

been terminated during the City's 1981 reduction in force program.

C. *Disposition by the Court in 1983.*

Following enactment of the Tregor Act, the police and fire unions and the state civil service officials petitioned for certiorari. The Court granted certiorari, and on April 18, 1983 the Court heard oral argument on the merits. In their brief on the merits and at oral argument, the minority officers suggested that the controversy giving rise to the lower courts' decisions had become moot.

On May 16, 1983, the Court issued a per curiam decision which vacated the judgment of the court of appeals and remanded the cases for consideration of mootness in light of the Tregor Act. *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP, Inc.*, 461 U.S. 477 (1983).

D. *1983 Proceedings on Remand.*

On August 31, 1983, the court of appeals held that the minority officers' motions to modify the prior remedial decrees were moot. *Boston Chapter, NAACP* v. *Beecher*, 716 F.2d 931 (1st Cir. 1983). The court of appeals held that "to avoid mootness a case must present both live issues and parties with legally cognizable interests." *Id.* at 933. In light of the Tregor Act's mandatory reinstatement of all laid-off officers with restored seniority and its removal of the imminent threat of further layoffs, the court of appeals concluded that the minority officers "now lack the 'personal stake' necessary to keep alive the controversy which engendered this proceeding" and that a ruling by the federal court "would amount to no more than an advisory opinion." *Id.* The court of appeals vacated the district court's August 7, 1981 orders and remanded the cases to the

district court with instructions to dismiss the motions for modification as moot.

On December 30, 1983, the district court entered a final order vacating its August 7, 1981 orders and dismissing the minority officers' motions for modification.

E. *Disposition by the Court in 1984.*

Following the court of appeals' 1983 decision on remand, the police and fire unions again petitioned for certiorari. The state civil service defendants did not. Neither, of course, did the City defendants.

While these petitions for certiorari were pending, the Court decided *Firefighters Local Union No. 1784* v. *Stotts*, ___ U.S. ___, 104 S.Ct. 3576 (1984) ("*Stotts*"). In that case, the Court ruled upon the scope of judicial relief under Title VII and its permissible impact upon bona fide seniority systems at a time of layoffs. These issues were similar to the issues on the merits which had previously been presented in the Boston cases when minority officers had sought to restrain Boston's layoff program. The Court in *Stotts* also considered whether the controversy in that case had become moot pending appeal.

On July 5, 1984, the Court granted certiorari in these cases. The Court vacated the 1983 judgment of the court of appeals and remanded to that court for further consideration in light of *Stotts*.

F. *The Court of Appeals' 1984 Decision on Remand.*

In compliance with the Court's mandate, the court of appeals thoroughly reviewed the impact of *Stotts* on these cases. The parties were invited to identify matters for consideration by the court and were provided with an opportunity to brief and argue the issue of mootness fully. Following briefing and oral

argument, and based upon the court's review of the entire record, on December 7, 1984, in a per curiam decision, the court of appeals concluded that these cases are moot. *Boston Chapter, NAACP* v. *Beecher*, 749 F.2d 102 (1st Cir. 1984).

Upon careful consideration, it was evident to the court of appeals that these cases "differ[ed] from *Stotts*, in respect to mootness, in several important ways." *Id.* at 104. First, in *Stotts*, the minority officers had received permanently enhanced seniority as a result of the district court's injunction. In these cases, however, "the parties agree that there is no seniority problem or issue." *Id.* Second, unlike in *Stotts*, the City employer, which is a necessary party to any disposition of back pay claims, is not a real party participating in these cases, and the court of appeals held that "[s]ince no party before [the court] has any financial stake in denying the laid-off employees' back pay, it is difficult to see how this matter can create a controversy between them." *Id.* Third, the district court's 1981 orders in these cases had already been vacated. Therefore, to hold that these cases are not moot "would mean resurrecting a dead order solely for the purpose of then striking it down on the merits." *Id.* Fourth, there is no longer any controversy about the merits or about the future impact of any prior ruling of the district court given the intervening *Stotts* decision. *Id.*

Giving consideration both to these distinctions and to basic principles of federal jurisdiction, the court of appeals concluded that the "legally correct approach" was to vacate the district court's 1981 orders as moot. *Id.*

On January 4, 1985, the district court once again entered an order dismissing as moot the minority officers' motions for modification.

Reasons for Denying the Writs.

I. The Court of Appeals' Mootness Decision Does Not Present a Substantial Federal Question.

Petitioners seek certiorari review of a decision which does not warrant such attention. The court of appeals addressed a question of mootness in light of facts and in the context of proceedings which are peculiar to these cases alone. Further decision regarding the particular mootness issues presented here will have no impact beyond the confines of these cases.

When the Court first granted certiorari in these cases in 1982, the decision then under review addressed a question of national importance regarding the scope of judicial relief under Title VII and its permissible impact, at a time of layoffs, on bona fide seniority systems. Subsequently, however, the Court has answered that question in *Stotts*. As a result, these cases no longer present an unresolved question of public importance which warrants decision by the Court. They present a question of mootness alone.

Mootness, however, depends peculiarly upon the unique set of factual circumstances and claims which obtains in any particular case. Indeed, the Court implicitly recognized this fact when it remanded these cases to the court of appeals following the *Stotts* decision. The only question presented here, therefore, does not raise any issue of unresolved federal law, national concern or even public importance. The scope of any further decision by the Court would be limited to the facts of these cases alone.

In any event, to the extent that the Court may wish to announce principles of mootness in cases involving employment layoffs, it has already spoken in *Stotts*. The express purpose of the Court's 1984 remand was to enable the court of

appeals to apply the principles announced in *Stotts*. This the court of appeals has done, and further review would serve no significant purpose.[1]

II. The Petitions Rely Upon Matters of Fact Not in the Record and Involve Undecided Issues of State Law.

These petitions are based on petitioners' assertion of factual matters which are not in the record and on their questionable speculation that a decision by the Court may influence application of state law in separate state proceedings. The Court should decline review under such circumstances.

The unions' petitions are premised on the notion that the Court should grant review and decide a mootness question in order to reach a decision on the merits which might in turn have some effect upon the resolution of certain union members' claims for back pay brought in Massachusetts Civil Service Commission proceedings. See Firefighters' petition at 6; Police Officers' petition at 15. This assertion cannot be adequately evaluated by the Court, however, since the record below contains virtually no information relating to these back pay claims or to the nature or status of any such state proceedings. To be sure, the unions asserted to the court of appeals, as they do to the Court in their present petitions, that back pay claims had been brought by some officers. Beyond that, however, there is nothing in the record which indicates the nature of the

[1] Should the Court deem further review to be appropriate, the Court should base its decision on a complete and thorough examination of the facts of these cases. Summary disposition of these cases, as suggested by the firefighters' union, would be wholly inappropriate. If it were appropriate, the Court could have taken such summary action in 1984 when these cases were last before the Court. Furthermore, only a reasoned opinion by the Court would clarify any error by the court of appeals.

claims assertedly made in the administrative proceedings, identifies the issues raised by the parties who are participating in those proceedings, clarifies the present state of those proceedings, discusses the state law applicable to those claims or suggests how any federal court decision will impact those state proceedings. The unions' petitions are understandably devoid of citation to any record material which would supply this information.[2]

In any event, the back pay claims must be made under state law, and it is likely that the Massachusetts Civil Service Commission will resolve, or has already resolved, those claims independently and regardless of any disposition of the federal court proceedings. The issue raised in the civil service proceedings presumably is whether, as a matter of state law, the layoffs of complaining officers were "justified." Massachusetts General Laws c. 31, § 43. If resolution of the federal controversy is unnecessary to disposition of this issue of state law, then even the unions — or, more precisely, some of their members — would have no basis to claim an interest in the outcome of the federal proceedings.

On the one hand, Massachusetts law, as well as federal law, suggests that federal appellate review of the August 7, 1981

---

[2] The police union petition does not in fact assert that there is any proceeding, of any sort, presently pending with respect to the impact of the layoff program upon police officers. The union, thus, does not even assert, let alone substantiate by record citation, the existence of any pending back pay claim which a decision by the Court might ever influence. Respondents, in fact, understand that on February 11, 1982, the Massachusetts Civil Service Commission denied police officers' claims for back pay, that no appeal has ever been taken from that decision to the Massachusetts courts and that those proceedings are, accordingly, closed. The police union, consequently, seeks an academic, not even an advisory, decision. The firefighters' petition, on the other hand, asserts that there are state administrative proceedings which are pending, but it concedes that there are numerous other issues, distinct from any issue relating to the validity of the district court's August 7, 1981 orders, which may be dispositive of those claims for back pay. Firefighters' petition at 5.

orders, even if it resulted in a reversal, would have no bearing upon the state law issue. Boston's 1981 layoffs were implemented pursuant to federal court orders. As such, it would appear that they were justified at the time they were implemented. This justification would not be negated by subsequent reversal of the orders, for a court order validly entered, when the court has both subject matter and personal jurisdiction, gives rise to a plain duty to obey until the order is stayed, vacated or reversed. *E.g. Town of Stow* v. *Marinelli*, 352 Mass. 738, 743-744, 227 N.E.2d 708, 713 (1967); *Maness* v. *Meyers*, 419 U.S. 449, 458-459 (1975); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293 (1947). Indeed, this was precisely the reasoning adopted by a hearing officer for the Massachusetts Civil Service Commission in a November 28, 1983 decision recommending that the Commission deny certain non-minority firefighters' claims for back pay. Recommended Decision, *McPherson, et al.* v. *City of Boston Fire Department*, Appointing Authority, Massachusetts Civil Service Commission, Appeal No. D-1280 at 15 (November 28, 1983). If this ruling is correct as a matter of Massachusetts law, then no federal court reversal of the district court's August 7, 1981 orders would have any bearing on any back pay claim under state law.

On the other hand, non-minority officers might also argue, or the Civil Service Commission might rule, that under Massachusetts law the City of Boston was not justified in laying off senior officers notwithstanding the entry of the district court's orders. It is possible, of course, that the City may have been subject to dual legal obligations — one arising from operation of state civil service law and the other arising from entry of a federal court order — in the event that it elected to proceed voluntarily with the layoff program. *Cf. W.R. Grace and Co.* v. *Local Union*, 461 U.S. 757 (1983). If this were the case, federal appellate review would similarly have no bearing on resolution of any back pay claim under state law.

Finally, even assuming that a decision regarding the appropriateness of the district court's 1981 orders may have some impact on the state law claims for back pay, that issue may be adequately decided by the Massachusetts Civil Service Commission. The unions do not assert that there will be a different disposition of the back pay claims if it is the Civil Service Commission, rather than the federal court, that decides the federal issue. Furthermore, there is no reason to question the ability of the Civil Service Commission to reach the correct result. The district court's 1981 orders have been vacated and have no precedential vitality. The principles which will control any determination of federal issues by the Civil Service Commission will be derived, accordingly, from the Court's decision in *Stotts*, not from the district court's 1981 orders. Therefore, regardless of whether certiorari is granted in these cases, an alternative remedy exists by which the unions' members may recover any back pay to which they may be entitled under state law. Review of these cases by the Court is simply unnecessary.

III. The Court of Appeals Correctly Determined that These Cases are Moot.

Following the Court's remand, the court of appeals fully reviewed the facts of these cases in light of *Stotts*. The court of appeals correctly determined that these cases differed from *Stotts* in several important ways and that, unlike *Stotts*, these cases are moot.

When *Stotts* reached the Court, both the minority officers and the petitioning City of Memphis had concrete interests which continued to be adverse and which could be resolved by a decision on the merits. In these cases, by contrast, the parties have no continuing controversy to resolve.

First, in *Stotts*, the minority officers and the City of Memphis continued to dispute the applicability of the lower court's order to future layoffs. *Stotts*, 104 S.Ct. at 2583. There is no such dispute here. The district court's 1981 orders have already been vacated, and, in light of the Court's decision in *Stotts*, the minority officers no longer defend them.[3]

Second, the minority officers in *Stotts* had gained, through operation of the district court's injunction, permanently enhanced seniority benefits. *Id.* at 2584-85. Adjudication on the merits, consequently, would "affect respondents themselves." *Id.* Indeed, Justice O'Connor found this point critical, noting that minority officers had "not waived" their enhanced seniority benefits and that a decision on the merits would resolve their claims to these benefits "in the very litigation in which they were originally won." *Id.* at 2591 (O'Connor, J., concurring). Unlike *Stotts*, the minority officers in these cases have gained no seniority benefits as a result of the district court's 1981 orders. Pursuant to the Tregor Act, all officers who were terminated in 1981 have been reinstated, 1982 Mass. Acts c. 190, § 25, and, in accordance with Massachusetts civil service law, all reinstated officers have had their seniority restored, Mass. G.L. c. 31, § 33. Consequently, a decision on the merits could have no impact on the minority officers' seniority rights. In contrast with *Stotts*, the minority officers in these cases have absolutely no stake in defending the 1981 orders. Regardless of whether the 1981 orders are affirmed or reversed, there is no interest of the minority officers which will be advanced, maintained, impaired or destroyed. Except as to matters of philosophy and principle, the minority officers are, in a word, indifferent.

[3] Before the court of appeals, the minority officers also argued that the district court's 1981 orders were never intended to apply to future layoffs. The court of appeals found it unnecessary to reach this argument, since the 1981 orders had been vacated and since the Supreme Court had reached a contrary result on the merits in *Stotts*.

Third, the lower court's order in *Stotts* restrained the City of Memphis from granting back pay to the laid-off firefighters, and for that reason the City sought appellate review. *Stotts*, 104 S.Ct. at 2584. Here, however, the City of Boston has never been restrained from awarding back pay and has never challenged any restraint imposed upon it. In fact, the City has never taken a position on the merits of the federal issues during the entire course of the federal court proceedings. Moreover, minority officers have never sought to deprive non-minority officers of pay and have no interest now in opposing any award of back pay. If there is a back pay controversy, therefore, it is a controversy between the City and union members which arises under state law and which has a separate forum for adjudication. That controversy is best resolved in the state administrative proceedings where the parties with truly adverse interests can advocate their respective positions.

Fourth, decision on the merits, even reversal of the district court's 1981 orders, would not provide the union members with back pay. The power of a federal court "only extends over and is limited by the conditions of the case now before [it]," *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 370 (1960), *quoting American Book Co.* v. *Kansas*, 193 U.S. 49, 52 (1904), and there simply are no claims for back pay pending before the federal court. *Compare Alejandrino* v. *Quezon*, 271 U.S. 528, 533-535 (1926) *with Powell* v. *McCormack*, 395 U.S. 486, 497-499 (1969). Accordingly, any decision by this Court would be advisory at best.

Conclusion.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

JAMES S. DITTMAR*,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200

BARBARA R. ARNWINE,
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW OF THE
BOSTON BAR ASSOCIATION,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1145

Counsel for Respondents
**Counsel of Record*

Of Counsel:

RICHARD R. LAVIN,
MATTHEW D. BAXTER,
WIDETT, SLATER & GOLDMAN, P.C.,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200

Appendix.

Massachusetts General Laws.

Chapter 31, § 43.

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, so requests in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after the filing of such request and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

The commission shall affirm the action of the appointing authority if it finds that such action is justified. Otherwise it shall reverse such action, and the person concerned shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.